

# Seeing the Forest Through the Trees: A Revealing Look at Inherent Management Rights After the *SERB v. Youngstown City School District Board of Education* Decision and the Legislative Failure of 1995

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*"I give up. Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.'"*<sup>\*</sup>

## I. INTRODUCTION

In the summer of 1995, the Ohio State Employment Relations Board (SERB) issued *SERB v. Youngstown City School District Board of Education*<sup>1</sup> (*Youngstown*). The *Youngstown* decision addressed two significant issues: (1) the determination of mandatory subjects<sup>2</sup> of bargaining<sup>3</sup> and (2) the deference given to arbitration decisions by SERB.<sup>4</sup> SERB's outcome on these two issues poses continued problems for state public employers regarding mandatory subjects of bargaining,<sup>5</sup> as well as difficulties for both state public employers and unions with respect to arbitration.<sup>6</sup> The good news for both state public employers and unions is

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<sup>\*</sup> SEC v. Chenery Corp., 332 U.S. 194, 214 (1947) (Jackson, J., dissenting).

<sup>1</sup> 12 OPER ¶ 1543, X-390 (Ohio State Employment Relations Board June 30, 1995).

<sup>2</sup> Mandatory subjects of bargaining are those subjects that require state public employers to collectively bargain with the public employees' representative union over the actual decision the state public employer wants to make. Typically, these issues include "rates of pay, wages, hours of employment, or other conditions of employment." THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 772, 772 (Charles J. Morris ed., 2d ed. 1983). In contrast to mandatory subjects of bargaining, permissive subjects of bargaining are those subjects that state public employers can unilaterally decide without collectively bargaining with the public employees' representative union. See *id.* at 894. However, for both mandatory and permissive subjects of bargaining, if those subjects affect wages, hours or terms and conditions of employment, then public employers and public employee representative unions must bargain over the "impact," or "effect," of those subjects. See *id.*

<sup>3</sup> See *Youngstown*, 12 OPER ¶ 1543, at X-391.

<sup>4</sup> See *id.* at X-395.

<sup>5</sup> See *infra* notes 133-177 and accompanying text.

<sup>6</sup> See *infra* notes 178-195 and accompanying text.

that the section in the *Youngstown* decision that discussed SERB's deference to arbitration is dicta<sup>7</sup> and, as such, not binding precedent.<sup>8</sup>

In addition to the two pitfalls created by SERB, state public employers must also deal with a third issue, the legislative failure of 1995.<sup>9</sup> In 1983, the legislature gave life to the Collective Bargaining Act.<sup>10</sup> The vital part of this act, which prevents state public employers from performing their jobs, is the "affects" language<sup>11</sup> contained in Ohio Revised Code (O.R.C.) section 4117.08(C).<sup>12</sup> In 1995, it appeared that the legislature would amend this provision, thereby giving state public employers the inherent management rights they had so long awaited.<sup>13</sup> However, even with a Republican majority in both the House and the Senate, as well as a Republican Governor, the legislature failed to perform this much needed surgery on the act.<sup>14</sup> As a result, state public employers must look to SERB to tell them which inherent management rights are really theirs to exercise.<sup>15</sup>

This Note addresses the three areas of concern highlighted above. Part II discusses the history of collective bargaining and the three parties involved in state employment collective bargaining in Ohio. Part III provides the recent history leading up to the *Youngstown* decision. Part IV discusses SERB's past interpretation of the "affects" language from O.R.C. section 4117.08(C), the balancing test created in the *ODOT* decision, the adoption of the balancing test in the *Youngstown* decision<sup>16</sup> and a look at statutory interpretation with an alternative interpretation other than the one offered by SERB. Part V discusses the deference that SERB should give to arbitration based on its own case law, on National Labor Relations Board (NLRB) case law and on public policy, in contrast to the extreme stance SERB announced in the *Youngstown* decision. Part VI discusses the

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<sup>7</sup> Because the issues before SERB were confined to (1) whether or not Early Retirement Incentive Plans were mandatory subjects of bargaining and (2) whether or not the representative union waived its right to bargain, the other matters addressed by SERB carry no binding authority. See *Youngstown*, 12 OPER ¶ 1543, at X-391. However, SERB's discussion of those other matters could indicate SERB's position on those issues.

<sup>8</sup> See *Cosgrove v. Williamsburg of Cincinnati Mgt. Co.*, 638 N.E.2d 991, 994 (Ohio 1994).

<sup>9</sup> See *infra* notes 196-221 and accompanying text.

<sup>10</sup> See *infra* notes 17-38 and accompanying text.

<sup>11</sup> See *infra* note 175.

<sup>12</sup> See *infra* note 33.

<sup>13</sup> See *infra* notes 196-210 and accompanying text.

<sup>14</sup> See *infra* notes 211-221 and accompanying text.

<sup>15</sup> See *infra* note 148.

<sup>16</sup> See *infra* notes 88 and 89.

legislative failure that occurred in 1983 and that is occurring now. Finally, Part VII concludes this Note by asserting that the *Youngstown* decision continues to ignore the concept of inherent management rights and poses potential problems for arbitration decision enforcement in Ohio, which, when coupled with the legislature's failure to act, only perpetuates the deficiencies connected with collective bargaining in Ohio.

## II. COLLECTIVE BARGAINING IN OHIO

### A. *The Legislative Battle for Collective Bargaining: Patience, Planning and Pay-off*

In 1983, Ohio joined the twenty-five other states<sup>17</sup> that had enacted comprehensive collective bargaining legislation for its public employees.<sup>18</sup> The legislature codified this legislation in O.R.C. chapter 4117, and referred to it as the "Collective Bargaining Act."<sup>19</sup> For many years, labor unions had attempted to persuade the state legislature to enact collective bargaining legislation.<sup>20</sup> In 1975 and 1977, the labor unions succeeded in getting collective bargaining statutes passed by the legislature.<sup>21</sup> However, on both those occasions, Governor James Rhodes vetoed the legislation before him.<sup>22</sup>

Learning from these defeats, the labor unions realized that the only way to insure passage of collective bargaining legislation required the election of

<sup>17</sup> In 1983, states that offered full coverage of public employees via collective bargaining acts included Alaska, California, Connecticut, Delaware, the District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont and Wisconsin; states that offered partial coverage for public employees via collective bargaining acts included Alabama, Georgia, Idaho, Indiana, Kentucky, Maine, Maryland, Nevada, North Dakota, Oklahoma, Tennessee, Texas, Washington and Wyoming; and states that offered no coverage to public employees included Arizona, Arkansas, Colorado, Louisiana, Mississippi, New Mexico, North Carolina, South Carolina, Utah, Virginia and West Virginia. See Calvin W. Sharpe, *The Ohio Public Sector Collective Bargaining Law: First Anniversary Colloquium*, 35 CASE W. RES. L. REV. 345, 349 (1985).

<sup>18</sup> See Note, *Public Employee Collective Bargaining Becomes a Matter of Right in Ohio*, 13 CAP. U. L. REV. 219, 219-221 (1983).

<sup>19</sup> See James T. O'Reilly, *More Magic with Less Smoke: A Ten Year Retrospective on Ohio's Collective Bargaining Law*, 19 U. DAYTON L. REV. 1, 1 (1993).

<sup>20</sup> See *id.* at 2-3.

<sup>21</sup> See *id.*

<sup>22</sup> See *id.* at 2.

a governor and legislators sympathetic to their position.<sup>23</sup> The two key figures that eventually helped enact O.R.C. chapter 4117 were Governor Richard F. Celeste and Senator Eugene Branstool.<sup>24</sup> The critics of the labor unions pointed to the large contributions made to both Governor Celeste's campaign and Senator Branstool's campaign as evidence of union influence.<sup>25</sup> The unions contributed approximately \$1,000,000 to Celeste's campaign coffers and \$43,000 to Branstool's campaign coffers.<sup>26</sup> Other pro-union legislators received contributions from the labor unions as well.<sup>27</sup> Not surprisingly, on July 6, 1983, the labor unions recouped their investment when Governor Celeste signed Amended Substitute Senate Bill 133 into law.<sup>28</sup>

During the drafting of O.R.C. chapter 4117, the Ohio legislators looked to the collective bargaining laws in both Michigan and Pennsylvania for guidance.<sup>29</sup> Referencing the Michigan and Pennsylvania collective bargaining acts enabled the pro-union Ohio legislative drafters to discern what provisions did and did not benefit the labor unions in Michigan and Pennsylvania. Thus, a strong presumption can be made that the pro-union Ohio legislative drafters utilized language from the Michigan and Pennsylvania statutes in O.R.C. chapter 4117 that favored the Ohio labor unions.<sup>30</sup>

In a survey involving labor union representatives, union comments ranged from "there's no place I'd rather be" to "the cream, at the top" when referencing O.R.C. chapter 4117.<sup>31</sup> As illustrated by this Note, the pro-union legislative drafters accomplished what they intended to do—Ohio's collective bargaining act is notably slanted in favor of the labor unions.

Early on, it became apparent that one of the key areas of conflict revolved around the language in O.R.C. section 4117.08(C).<sup>32</sup> Specifically, the first part of the aforementioned provision (O.R.C. section

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<sup>23</sup> See *id.* at 3.

<sup>24</sup> See *id.*

<sup>25</sup> See James T. O'Reilly & Neil Gath, *Structures and Conflicts: Ohio's Collective Bargaining Law for Public Employees*, 44 OHIO ST. L.J. 891, 894 (1983).

<sup>26</sup> See *id.* at 894 n.39.

<sup>27</sup> See O'Reilly, *supra* note 19, at 3.

<sup>28</sup> See O'Reilly & Gath, *supra* note 25, at 894, 895. The Democrat-majority Senate passed the legislation along party lines by a vote of 17 for and 16 against. See *id.* at 894 n.38.

<sup>29</sup> See O'Reilly, *supra* note 19, at 28.

<sup>30</sup> See *id.*

<sup>31</sup> *Id.* at 28 n.205.

<sup>32</sup> See Note, *supra* note 18, at 234.

4117.08(C)(1)-(9))<sup>33</sup> took inherent management rights away from the bargaining table,<sup>34</sup> while the second part of the provision (the "affects" language)<sup>35</sup> seemed to place those inherent management rights back on the bargaining table.<sup>36</sup> As a result, the legislation as written did not seem to secure any true inherent management rights.<sup>37</sup> In the years following passage of O.R.C. chapter 4117, SERB's several attempts at interpreting O.R.C. section 4117.08(C) have affirmed this very concern.<sup>38</sup>

## B. The Triumvirate and the Distribution of Responsibilities

O.R.C. chapter 4117 is a comprehensive statute that creates and empowers the three entities necessary for successful operation of the

<sup>33</sup> O.R.C. § 4117.08(C) states in pertinent part:

Unless a public employer agrees otherwise in a collective bargaining agreement, *nothing in Chapter 4117. of the Revised Code impairs the right and responsibility of each public employer to:*

- (1) *Determine matters of inherent managerial policy* which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, and organizational structure;
  - (2) Direct, supervise, evaluate, or hire employees;
  - (3) Maintain and improve the efficiency and effectiveness of governmental operations;
  - (4) Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;
  - (5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees;
  - (6) Determine the adequacy of the work force;
  - (7) Determine the overall mission of the employer as a unit of government;
  - (8) Effectively manage the work force;
  - (9) Take actions to carry out the mission of the public employer as a governmental unit.
- The employer is not required to bargain on subjects reserved to the management and direction of the governmental unit *except as affect wages, hours, terms and conditions of employment.*

OHIO REV. CODE ANN. § 4117.08(C) (Baldwin 1995) (emphasis added).

<sup>34</sup> See Note, *supra* note 18, at 235; see also *supra* note 33.

<sup>35</sup> See *infra* note 175.

<sup>36</sup> See Note, *supra* note 18, at 235-236; see also *supra* note 33.

<sup>37</sup> See T. Merritt Bumpass, Jr. & Keith A. Ashmus, *Public Sector Bargaining in a Democracy An Assessment of the Ohio Public Employee Collective Bargaining Law*, 33 CLEV. ST. L. REV. 593, 638 (1986).

<sup>38</sup> See *infra* notes 133-177 and accompanying text.

Collective Bargaining Act.<sup>39</sup> The statute also defines the responsibilities of each of those entities.<sup>40</sup> The first entity, SERB, began with the appointment of three members to the Board by the governor, and subsequently consented to by the Senate.<sup>41</sup> The statute requires a certain level of expertise by the three board members in the area of labor relations or personnel practices.<sup>42</sup> Because the governor appoints the board members, no more than two board members from the same political party can serve simultaneously.<sup>43</sup> The statute also prohibits any conflicts of interest by sitting board members.<sup>44</sup> In order to fulfill their statutory responsibilities, the statute charges the board members with appointing an executive director, attorneys, examiners, mediators, arbitrators, fact-finding panels and other necessary employees.<sup>45</sup> The statute prescribes that SERB's responsibilities include writing an annual report of its activity to the governor and legislature,<sup>46</sup> holding hearings on labor-management matters and training representatives from both labor and management on the rules and regulations, as well as other stated responsibilities.<sup>47</sup>

Likewise, the statute creates the Office of Collective Bargaining (OCB).<sup>48</sup> OCB represents the state public employers in most labor matters<sup>49</sup> covered under O.R.C. chapter 4117.<sup>50</sup> Although not expressly outlined by the statute, OCB consists of a deputy director, a chief counsel with staff and a chief of operations with staff.<sup>51</sup> The responsibilities of OCB involve

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<sup>39</sup> See *infra* notes 40-65 and accompanying text.

<sup>40</sup> See *id.*

<sup>41</sup> See OHIO REV. CODE ANN. § 4117.02(A) (Baldwin 1995). In light of this, the appointing governor is able to appoint members who are sympathetic to the position of that governor in the area of labor-management issues. Hence, Governor Celeste appointed two pro-union members to interpret the already pro-union statute. Ironically, one of Governor Celeste's appointees, SERB Chairman Jack Day, interpreted O.R.C. § 4117.08(C) as advocated in this Note. See *infra* notes 167-177 and accompanying text.

<sup>42</sup> See OHIO REV. CODE ANN. § 4117.02(A) (Baldwin 1995).

<sup>43</sup> See *id.*

<sup>44</sup> See *id.*

<sup>45</sup> See OHIO REV. CODE ANN. § 4117.02(E) (Baldwin 1995).

<sup>46</sup> See OHIO REV. CODE ANN. § 4117.02(C) (Baldwin 1995).

<sup>47</sup> See OHIO REV. CODE ANN. § 4117.02(H) (Baldwin 1995).

<sup>48</sup> See OHIO REV. CODE ANN. § 4117.10(D) (Baldwin 1995).

<sup>49</sup> In accordance with O.R.C. § 2743.14, the Attorney General's office represents the state public employers in all formal court actions. See OHIO REV. CODE ANN. § 2743.14 (Baldwin 1995).

<sup>50</sup> See *id.*

<sup>51</sup> See Interview with Richard J. Mattera, Legal Intern for the Office of Collective Bargaining, in Columbus, Ohio (December 14, 1995) (on file with author).

assisting the director in formulating and implementing policies;<sup>52</sup> negotiating and entering into agreements with the various unions that represent the public employees;<sup>53</sup> coordinating the mediation hearings, fact-finding panels and arbitration cases;<sup>54</sup> preparing for negotiations<sup>55</sup> and writing an annual report of its activity to the governor and legislature.<sup>56</sup>

Finally, the statute provides for the representation of the various state public employees by unions.<sup>57</sup> Because unions are private entities, the statute does not actually create the unions, but allows unions to become the exclusive representatives of certain groups of public employees.<sup>58</sup> First, the statute lists the rights of state public employees.<sup>59</sup> In order to protect those rights, the statute provides an election procedure that allows a group of state public employees to vote for the union that they want to represent them in collective bargaining matters.<sup>60</sup> Once the state public employees select a representative by a majority vote, SERB certifies that union as the exclusive representative of those state public employees.<sup>61</sup> Last, the statute lists the rights of the exclusive representative.<sup>62</sup>

Currently, five unions exclusively represent the various state public employees.<sup>63</sup> These state public employees operate under seven contracts negotiated between OCB and the respective exclusive representatives.<sup>64</sup> When an Unfair Labor Practice (ULP) arises, SERB adjudicates the issue between the two parties.<sup>65</sup>

<sup>52</sup> See OHIO REV. CODE ANN. § 4117.10(D)(1) (Baldwin 1995).

<sup>53</sup> See OHIO REV. CODE ANN. § 4117.10(D)(2) (Baldwin 1995).

<sup>54</sup> See OHIO REV. CODE ANN. § 4117.10(D)(3) (Baldwin 1995).

<sup>55</sup> See OHIO REV. CODE ANN. §§ 4117.10(D)(4)-(5) (Baldwin 1995).

<sup>56</sup> See OHIO REV. CODE ANN. § 4117.10(D)(6) (Baldwin 1995).

<sup>57</sup> See *infra* notes 59-62 and accompanying text.

<sup>58</sup> See *id.*

<sup>59</sup> See OHIO REV. CODE ANN. §§ 4117.03(A)(1)-(5) (Baldwin 1995).

<sup>60</sup> See OHIO REV. CODE ANN. § 4117.07 (Baldwin 1995).

<sup>61</sup> See OHIO REV. CODE ANN. §§ 4117.05-.06 (Baldwin 1995).

<sup>62</sup> See OHIO REV. CODE ANN. § 4117.04 (Baldwin 1995).

<sup>63</sup> These unions include: (1) the Ohio Civil Service Employees Association, the American Federation of State, County and Municipal Employees, Local 11, AFL-CIO; (2) District 1199, Service Employees International Union, AFL-CIO; (3) the United Food & Commercial Workers, AFL-CIO; (4) the State Council of Professional Educators, Ohio Education Association/National Education Association and (5) Fraternal Order of Police, Ohio Labor Council, Inc.

<sup>64</sup> One contract covers each union with the exception of the Fraternal Order of Police, who operate under three separate contracts for Unit 1, Unit 2 and Unit 15. The contracts cover three years and are replaced by a new contract after each round of bargaining.

<sup>65</sup> See *supra* note 47.

III. THE HISTORY BEHIND THE *YOUNGSTOWN* DECISION

The *Youngstown* case evolved from a dispute between the Youngstown City School District Board of Education (Board of Education) and the Youngstown Education Association (YEA) over Early Retirement Incentive Plans (ERIP).<sup>66</sup> In December of 1992, the Board of Education began bargaining with administrative employees to create a new ERIP to facilitate the downsizing of the administrative employees.<sup>67</sup> The administrative employees belonged to the Youngstown Association of Administrative and Supervisory Personnel (ASP).<sup>68</sup>

After several bargaining sessions, the Board of Education reached an agreement with ASP on an ERIP.<sup>69</sup> In accordance with O.R.C. section 3307.35,<sup>70</sup> the Board of Education extended the ERIP with the same terms to YEA members under Board Resolution No. 18-93.<sup>71</sup> The Board of Education did this unilaterally without notice to, or negotiation with, YEA.<sup>72</sup> After the unilateral extension to YEA members, the Board of Education offered to bargain the effects of Board Resolution No. 18-93 with YEA.<sup>73</sup>

In response, YEA requested that the Board of Education cease and desist implementation of the ERIP and demanded that the Board of Education bargain with YEA over the downsizing decision.<sup>74</sup> The Board of Education refused to comply with YEA's request.<sup>75</sup> Because the Board of Education had effectively adopted and offered the ERIP to YEA members, YEA decided not to engage in effects bargaining.<sup>76</sup>

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<sup>66</sup> See *Youngstown*, 12 OPER ¶ 1543, at X-391.

<sup>67</sup> See *id.*

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

<sup>70</sup> O.R.C. § 3307.35 reads in pertinent part:

Participation in the plan shall be available to all eligible employees except that the employer may limit the number of persons for whom it purchases credit in any calendar year to a specified percentage of its employees who are members of the state teachers retirement system on the first day of January of that year.

OHIO REV. CODE ANN. § 3307.35 (Baldwin 1995), amended by 1996 Ohio Legis. Serv. L-2069 (Baldwin).

<sup>71</sup> See *Youngstown*, 12 OPER ¶ 1543, at X-391-392.

<sup>72</sup> See *id.* at X-392.

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> See *id.*

<sup>76</sup> See *id.*



Instead, YEA filed a ULP charge with SERB and a grievance with the Board of Education.<sup>77</sup> An arbitration award settled the grievance by requiring the Board of Education to negotiate with YEA over an ERIP with terms better than or equal to the ERIP with ASP.<sup>78</sup> In spite of the arbitration award, SERB issued a finding of probable cause that the Board of Education had committed an unfair labor practice.<sup>79</sup> SERB issued a complaint, and shortly thereafter, a hearing took place before a SERB hearing officer.<sup>80</sup>

In the Proposed Order, the Hearing Officer concluded that the Board of Education had violated O.R.C. sections 4117.11(A)(1)<sup>81</sup> and (5)<sup>82</sup> by implementing the ERIP with YEA members without giving notice to, or negotiating with, YEA.<sup>83</sup> The Board of Education filed exceptions to the Hearing Officer's Proposed Order. The SERB Board then heard the case.<sup>84</sup>

After the hearing, SERB issued the *Youngstown* decision.<sup>85</sup> For purposes of this Note, only the two aforementioned aspects of the *Youngstown* decision—determining mandatory subjects of bargaining and giving deference to arbitration decisions—will be discussed.

In the *Youngstown* decision, SERB attempts to interpret O.R.C. section 4117.08(C)(1)-(9),<sup>86</sup> which delineates specific areas of inherent management rights. SERB's interpretation of O.R.C. section 4117.08(C) results in the adoption of a balancing test<sup>87</sup> nearly identical<sup>88</sup> to the balancing test

<sup>77</sup> See *id.*

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> See *id.*

<sup>81</sup> A violation of O.R.C. § 4117.11(A)(1) occurs when an employer "[i]nterfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in Chapter 4117 of the Revised Code or an employee organization in the selection of its representative for purposes of collective bargaining or the adjustment of grievances." OHIO REV. CODE ANN. § 4117.11(A)(1) (Baldwin 1995).

<sup>82</sup> A violation of O.R.C. § 4117.11(A)(5) occurs when an employer "[r]efuse[s] to bargain collectively with the representative of his employees recognized as the exclusive representative or certified pursuant to Chapter 4117. of the Revised Code." OHIO REV. CODE ANN. § 4117.11(A)(5) (Baldwin 1995).

<sup>83</sup> See *Youngstown*, 12 OPER ¶ 1543, at X-392.

<sup>84</sup> See *id.*

<sup>85</sup> See *id.*

<sup>86</sup> See *supra* note 33.

<sup>87</sup> See *infra* note 128.

<sup>88</sup> The only difference between the balancing test in the *Youngstown* decision and the balancing test in the *ODOT* decision is that the *Youngstown* balancing test drops the third prong of the *ODOT* balancing test. This third prong considered the "extent to which the

previously elucidated in the *SERB v. Ohio Department of Transportation*<sup>89</sup> (ODOT) decision. This balancing test gives an ineffectual<sup>90</sup> reading to O.R.C. section 4117.08(C)(1)-(9) because, according to SERB's interpretation in the *Youngstown* decision, "the first sentence of this clause [O.R.C. section 4117.08(C)(1)-(9)] gives, but the second takes away [the "affects" language]."<sup>91</sup>

SERB's interpretation in the *Youngstown* decision is a semantic sleight of hand intended to give the appearance that one side (management) gained something and the other side (unions) lost something. In fact, no such gain or loss really occurred by SERB's interpretation in the *Youngstown* decision.<sup>92</sup> The first critics of the 1983 Act<sup>93</sup> expressed concern that "too many issues could be moved from management prerogatives to bargainable issues"<sup>94</sup> because of the language in O.R.C. section 4117.08(C). After thirteen years of continual conflict over the correct interpretation of O.R.C. section 4117.08(C),<sup>95</sup> SERB still ignores the basic concept that interpreting the "affects" language as it does, renders all of the language prior to that one word ineffectual.<sup>96</sup> Hence, state public employers still cannot make a decision without being second guessed by either a union or SERB.

In addition, SERB's assertion in the *Youngstown* decision that it is not bound by an arbitrator's decision<sup>97</sup> is against relevant case law and public policy. This position eliminates incentives for parties to bargain and enter

subject matter had been addressed or preempted by legislation." *ODOT*, 10 OPER ¶ 1262, at X-200 (Ohio State Employment Relations Board April 29, 1993). SERB expressly notes in the *Youngstown* decision that it is "axiomatic" that the legislature can preempt a SERB determination. *See Youngstown*, 12 OPER ¶ 1543, at X-397 n.7. This conclusion effectively states the obvious, and notes the superfluous nature of a statutory prong.

<sup>89</sup> *Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO v. Ohio Department of Transportation*, 10 OPER ¶ 1262, X-196 (Ohio State Employment Relations Board April 29, 1993), *vacated as moot*, 12 OPER ¶ 1476, X-342 (Oh. Ct. App., 10th Dist., 1995).

<sup>90</sup> "Ineffectual" here and throughout this article refers to the interpretation as it fails to protect the inherent management rights of state public employers. Unions, to the contrary, would see the interpretation as highly effective because it allows unions, at a minimum, to challenge every decision a state public employer makes.

<sup>91</sup> JAMES T. O'REILLY, *OHIO PUBLIC EMPLOYEE COLLECTIVE BARGAINING* 205 (2d ed. 1992); *see also supra* note 33.

<sup>92</sup> *See infra* note 148.

<sup>93</sup> *See generally supra* note 19.

<sup>94</sup> O'REILLY, *supra* note 91, at 52.

<sup>95</sup> *See infra* notes 133-177 and accompanying text.

<sup>96</sup> *See infra* note 148.

<sup>97</sup> *See Youngstown*, 12 OPER ¶ 1543, at X-395.

into binding arbitration because SERB can disregard the arbitrator's decision at its own whim.<sup>98</sup> Although this position is dicta, it may indicate how SERB will decide future cases, and so it should concern both state public employers and unions.

#### IV. DETERMINING MANDATORY SUBJECTS OF BARGAINING WHILE PRESERVING INHERENT MANAGEMENT RIGHTS—AN OXYMORON IN OHIO

When a sports team follows a year in which it posted a 2-14 record with a 6-10 record, many will cite the four game improvement as evidence of the team's "success." Others will note that the team still needs to win at least four games to make the playoffs. Similarly, because the 1986 *SERB v. Lorain City School District Board of Education*<sup>99</sup> (*Lorain*) and the 1988 *SERB v. City of Lakewood*<sup>100</sup> (*Lakewood*) decisions emasculated inherent management rights so thoroughly, *ODOT* and *Youngstown* are steps in the right direction, but, like the 6-10 sports team, SERB will have to do much better to reach the "playoffs."

##### A. *Inherent Management Rights Forgotten: Lorain and Lakewood*

In the *Lorain* decision,<sup>101</sup> a 2-1 SERB majority held that the "affects" language of O.R.C. section 4117.08(C) required state public employers to bargain<sup>102</sup> with the unions over any decision that "affected" wages, hours or terms and conditions of employment.<sup>103</sup> As can be easily recognized, virtually every decision by state public employers will "affect" wages, hours or terms and conditions of employment.<sup>104</sup> This public employer's worst nightmare is exactly what happened over the next several years as evidenced by the *Lakewood*<sup>105</sup> decision.

In *Lakewood*, SERB held that "when a matter 'affects' wages, hours, terms and other conditions of employment, that matter is subject to

<sup>98</sup> See *infra* notes 178-195 and accompanying text.

<sup>99</sup> 3 OPER ¶ 3064, VII-129 (Ohio State Employment Relations Board May 15, 1986), *aff'd*, *Lorain City Sch. Dist. Bd. of Educ. v. SERB (Lorain II)*, 533 N.E.2d 264 (Ohio 1988).

<sup>100</sup> 5 OPER ¶ 5513, X-403 (Ohio State Employment Relations Board July 11, 1988).

<sup>101</sup> 3 OPER ¶ 3064, VII-129 (Ohio State Employment Relations Board May 15, 1986).

<sup>102</sup> "Bargain" in this context refers to decision bargaining, not effects bargaining, which may be required independently of whether the subject in contention is mandatory or permissive in nature.

<sup>103</sup> See O'Reilly, *supra* note 19, at 11.

<sup>104</sup> See *id.*

<sup>105</sup> See generally *Lakewood*, 5 OPER ¶ 5513, at X-403.

bargaining."<sup>106</sup> SERB noted that the "affects" language of O.R.C. section 4117.08(C) must be given effect.<sup>107</sup> As a result, SERB interpreted the last clause in O.R.C. section 4117.08(C) to curtail the previously delineated management rights listed in O.R.C. section 4117.08(C)(1)-(9).<sup>108</sup> This interpretation is somewhat problematic because it essentially allows one word to negate a significant number of words before it.<sup>109</sup> Although this could have been the intent of the pro-union drafters,<sup>110</sup> that intent is irrelevant when interpreting the statute to give effect to all the words—not just the one word that suits a specific political agenda.<sup>111</sup>

To make matters worse for state public employers, the Supreme Court of Ohio affirmed SERB's ineffectual interpretation of the "affects" language in O.R.C. section 4117.08(C).<sup>112</sup> In a 4-3 decision, the Supreme Court of Ohio held that "where the exercise of a management right causes a change in or 'affects' working conditions or terms of a contract, then the decision to exercise that right is a mandatory subject of bargaining."<sup>113</sup> The Supreme Court of Ohio noted a trend in other states to support SERB's interpretation of Ohio's collective bargaining statute.<sup>114</sup> Hence, as far as SERB and the Supreme Court of Ohio were concerned, the concept of inherent management rights that allowed state public employers to act without fear of being challenged by a union was nonexistent.<sup>115</sup>

The reaction to the Supreme Court of Ohio's decision differed drastically between state public employers and unions.<sup>116</sup> State public employers criticized the decision because it further weakened their position, while unions applauded the decision as a correct transfer of power.<sup>117</sup> Thus, O.R.C. section 4117.08(C) became the battleground in the Ohio labor movement.

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<sup>106</sup> *Id.* at X-404.

<sup>107</sup> *See id.*

<sup>108</sup> *See id.*; *see also supra* note 33.

<sup>109</sup> *See supra* note 33.

<sup>110</sup> *See infra* notes 156-177 and accompanying text.

<sup>111</sup> As noted by Jacquelin F. Drucker, a labor law expert, "[t]he word 'affect' was carefully chosen and deliberately designed to require public employers to bargain over a very broad range of issues." Stephen Phillips, *Wading into Battle over Bargaining Law*, THE PLAIN DEALER, June 16, 1996, at A20.

<sup>112</sup> *See Lorain City Sch. Dist. Bd. of Educ. v. SERB*, 533 N.E.2d 264, 268 (Ohio 1988).

<sup>113</sup> *Id.*

<sup>114</sup> *See id.*

<sup>115</sup> *See O'REILLY, supra* note 91, at 49.

<sup>116</sup> *See O'Reilly, supra* note 19, at 12.

<sup>117</sup> *See id.*

B. *Semantic Sleight of Hand I: ODOT*

Several major changes occurred in Ohio after the Supreme Court of Ohio's decision affirming SERB's ineffectual interpretation of O.R.C. section 4117.08(C). The most important change came when Ohio elected George V. Voinovich, a Republican, as its governor in 1990.<sup>118</sup> With the 1990 election victory came the second key change—the power of the new governor to appoint more moderate, pro-management members to the expiring terms at SERB.<sup>119</sup> The final key change came with the Republican wins in the legislature in 1994.<sup>120</sup> These changes allowed for a return to management of the inherent rights it should have received back in 1983. Although some would argue to the contrary, this Note will illustrate that the proper return of inherent rights to management has not yet occurred.

In the 1993 *ODOT* decision, SERB revisited the “affects” language in O.R.C. section 4117.08(C).<sup>121</sup> *ODOT* transpired because the Ohio Department of Transportation unilaterally implemented a non-smoking policy in its facilities.<sup>122</sup> The union, OCSEA/AFSCME, filed a complaint alleging violation of O.R.C. section 4117.11(A)(1)<sup>123</sup> and (5).<sup>124</sup> The Hearing Officer recommended dismissal of the complaint, and the union appealed to the SERB Board.<sup>125</sup> The SERB Board granted a hearing.

In its decision, SERB semantically changed its tune as compared to the *Lorain* and *Lakewood* decisions by noting that the interpretations in *Lorain* and *Lakewood* “virtually eliminated the concept of management rights [which was] not contemplated by the law itself.”<sup>126</sup> SERB then set out to reconcile the statutory language with the “reality of public sector bargaining.”<sup>127</sup> This reconciliation came in the form of the balancing test mentioned earlier.<sup>128</sup>

<sup>118</sup> See *id.*

<sup>119</sup> See *id.*

<sup>120</sup> See Roger K. Lowe, *Republicans Can Expect to Make Gains in Ohio Elections*, THE COLUMBUS DISPATCH, Oct. 3, 1994, at 7A.

<sup>121</sup> See generally *ODOT*, 10 OPER ¶ 1262, X-196 (Ohio State Employment Relations Board April 29, 1993).

<sup>122</sup> See *id.* at X-197.

<sup>123</sup> See *id.* at X-196; see also *supra* note 81.

<sup>124</sup> See *ODOT*, 10 OPER ¶ 1262, at X-196; see also *supra* note 82.

<sup>125</sup> See *ODOT*, 10 OPER ¶ 1262, at X-197.

<sup>126</sup> *Id.* at X-198.

<sup>127</sup> *Id.*

<sup>128</sup> SERB stated the balancing test as follows:

In June of 1995, the Court of Appeals for the 10th District vacated SERB's *ODOT* decision on the grounds of mootness.<sup>129</sup> The Court of Appeals held that because Governor Voinovich had issued an executive order<sup>130</sup> that prohibited smoking in most state facilities, the point became moot.<sup>131</sup> Therefore, the *ODOT* balancing test no longer provided guidance for state public employers or unions. Fortunately for SERB, the *Youngstown* case provided the opportunity to revive the *ODOT* balancing test.<sup>132</sup>

### C. Semantic Sleight of Hand II: Youngstown

Less than a month after the Court of Appeals vacated the *ODOT* decision, SERB issued the *Youngstown* decision.<sup>133</sup> In the *Youngstown* decision, SERB adopted the *ODOT* balancing test minus the superfluous

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[I]f a given subject is alleged to affect and is determined to have a material influence upon wages, hours, or terms and conditions of employment *and* involves the exercise of inherent management discretion, to determine whether it is a mandatory subject of bargaining, we will weigh:

- (1) the extent to which the subject is logically and reasonably related to wages, hours, terms and other conditions of employment;
- (2) the extent to which the employer's obligation to negotiate may significantly abridge its freedom to exercise those managerial prerogatives set forth in and anticipated by O.R.C. § 4117.08(C), including an examination of the type of employer involved and whether inherent discretion on the subject matter at issue is necessary to achieve the employer's essential mission and obligations to the general public;
- (3) the extent to which the subject matter had been addressed or preempted by legislation; and
- (4) the extent to which the mediatory influence of collective bargaining and, when necessary, any impasse resolution mechanisms available to the parties, are the appropriate means of resolving conflicts over the subject matter.

*ODOT*, 10 OPER ¶ 1262, at X-199.

<sup>129</sup> See *ODOT*, 12 OPER ¶ 1476, at X-343.

<sup>130</sup> Executive Order 93-01V prohibited smoking in most state facilities, including the Ohio Department of Transportation building. See *id.*

<sup>131</sup> See *id.* at X-344.

<sup>132</sup> See *Youngstown*, 12 OPER ¶ 1543, at X-390.

<sup>133</sup> See *id.*

third prong<sup>134</sup> that dealt with issues of legislative preemption.<sup>135</sup> Hence, the new balancing test now consists of three prongs.<sup>136</sup>

Functionally, SERB applies the contested decision to the pre-test clause in the balancing test to determine if balancing is appropriate.<sup>137</sup> If balancing is not appropriate, then the decision is deemed a permissive subject of bargaining<sup>138</sup> that only requires the public employer to bargain over the effects of the decision;<sup>139</sup> if balancing is appropriate, then the decision is evaluated under the balancing test.<sup>140</sup> Because this Note does not consider the application of the balancing test as a measuring device but only considers the effect of the balancing test's existence on the concept of inherent management rights,<sup>141</sup> an exhaustive analysis of each prong of the balancing test will not be undertaken.<sup>142</sup>

As noted above in the *ODOT* decision (an inspection of the decisions will reveal the similarity in language between the *ODOT* and *Youngstown* decisions),<sup>143</sup> SERB proports to reject both *Lorain* and *Lakewood* in favor of the balancing test which SERB deems more "consistent with the presumed intention of the legislative enactments."<sup>144</sup> Although likely to be

<sup>134</sup> See *id.* at X-397 n.7.

<sup>135</sup> See *supra* note 88.

<sup>136</sup> See *Youngstown*, 12 OPER ¶ 1543, at X-393-X-394.

<sup>137</sup> The pre-test clause reads as follows:

[I]f a given subject is alleged to affect and is determined to have a material influence upon wages, hours, or terms and other conditions of employment and involves the exercise of inherent management discretion, the following factors must be balanced to determine whether it is a mandatory or permissive subject of bargaining.

*Youngstown*, 12 OPER ¶ 1543, at X-393.

<sup>138</sup> See *Youngstown*, 12 OPER ¶ 1543, at X-393-X-394.

<sup>139</sup> See *supra* note 2.

<sup>140</sup> See *id.*

<sup>141</sup> By virtue of the balancing test, state public employer powers are lessened because instead of having total control over the areas outlined in O.R.C. § 4117.08(C)(1)-(9), once a union files a ULP, state public employers must go before SERB to find out if their action is an inherent management right.

<sup>142</sup> In the decision *In re City of Canton*, 11 OPER ¶ 1433, X-321 (Ohio State Employment Relations Board June 29, 1994), SERB utilized a balancing test. Even though SERB applied the *ODOT* balancing test (with the statutory third prong), the case accurately illustrates how a balancing test works. For all intents and purposes, the result would be the same under the *Youngstown* balancing test.

<sup>143</sup> Compare *Youngstown*, 12 OPER ¶ 1543, at X-390 with *ODOT*, 10 OPER ¶ 1262, at X-196.

<sup>144</sup> *Youngstown*, 12 OPER ¶ 1543, at X-394.

true, the balancing test still provides "fertile ground"<sup>145</sup> for SERB to declare what is or is not an inherent management right. This construction continues to read the "affects" language in O.R.C. section 4117.08(C) as the tail that wags the entire provisional dog.

In effect, the balancing test requires a case-by-case inquiry "rather than a specific definition which clearly delineates management prerogatives from mandatory subjects of bargaining."<sup>146</sup> Hence, like the outcome under the *Lorain* and *Lakewood* standard, state public employers after *ODOT* remain unable to act with any degree of confidence.<sup>147</sup>

Although the *ODOT* and the *Youngstown* decisions give much-needed encouragement to state public employers, further analysis of the balancing test shows that such an interpretation still does not recognize the existence of any inherent management rights.<sup>148</sup> Functionally, unions can still challenge all public employer decisions.<sup>149</sup> Therefore, SERB could continue

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<sup>145</sup> See John F. Lewis et al., *Lessons To Be Learned from the Ohio Experience: A Management Perspective*, 18 J.L. & EDUC. 269, 300 (1989) (noting that the phrase "terms and conditions of employment" allows for an expansive interpretation of O.R.C. § 4117.08(C)).

<sup>146</sup> Nicholas A. Pittner et al., *Public Employee Collective Bargaining and Ohio State Public Employers: A New Perspective*, 17 U. TOL. L. REV. 719, 757 (1986).

<sup>147</sup> See O'REILLY, *supra* note 91, at 49.

<sup>148</sup> Again, state public employers must have some management rights that are inherent in their proper functioning that are beyond the reach of unions to challenge. Logically and linguistically, every management decision will affect wages, hours, or terms and conditions of employment. SERB concluded this much in both *Lorain* and *Lakewood*. So stated, state public employers have no rights. However, this cannot be the case, for O.R.C. § 4117.08(C)(1)-(9) lists numerous areas of inherent management discretion. SERB's ineffectual interpretation of this provision stripped these rights from management, and simply hiding behind the guise of a new, high-fangled balancing test still fails to cordon off even one inherent management right to state public employers. This Note rhetorically asks: Are there any inherent management rights? The initial conclusion seems to indicate that as SERB goes, so go inherent management rights. Only time and legislative inaction will give us the answer.

<sup>149</sup> See *supra* note 128. The language in the balancing test ("If a given subject is *alleged to affect . . .*") (emphasis added) clearly opens Pandora's box for the unions to challenge every management decision.



to find any inherent management right a mandatory subject of bargaining,<sup>150</sup> and so, public employer decisions remain subject to the whim of SERB.<sup>151</sup>

In the *Youngstown* decision, SERB goes to great lengths to point out the adoption of balancing tests by other states which have collective bargaining statutes.<sup>152</sup> Although other states do utilize balancing tests to differentiate between mandatory subjects of bargaining and inherent management rights, such use does not validate or vindicate balancing tests as the only or ideal solution.<sup>153</sup>

In all fairness to SERB, little can be done beyond a legislative change to give inherent management rights to state public employers. Because of the Supreme Court of Ohio's decision in *Lorain II*,<sup>154</sup> any action by SERB not remotely adhering to that holding would in all likelihood be reversed by the Supreme Court of Ohio. The chances of the Supreme Court of Ohio violating the principle of *stare decisis*<sup>155</sup> and disregarding a seven-year-old precedent is highly unlikely. Therefore, SERB's own hands are tied, and the *Youngstown* decision may be viewed as SERB's attempt to push the Supreme Court of Ohio's *Lorain II* holding as far as reasonably permissible.

<sup>150</sup> See *supra* note 128. Intuitively, the very existence of a balancing test means that SERB will either find the balancing test inapplicable or find the balancing test applicable. Regardless, the fate of a public employer's decision lies with SERB. Hence, second-guessing SERB will become the focus of state public employers.

<sup>151</sup> In *SERB v. Department of Youth Services*, 13 OPER ¶ 1397, X-303 (Ohio State Employment Relations Board April 26, 1996), SERB recently used the *Youngstown* balancing test to find that a public employer committed a ULP by implementing a decision without first bargaining over the decision and the effect of that decision. See *DYS*, 13 OPER ¶ 1397, at X-305-X-307. This case accurately demonstrates the contradiction created when SERB first incorrectly interpreted O.R.C. § 4117.08(C).

<sup>152</sup> See *Youngstown*, 12 OPER ¶ 1543, at X-394. SERB cites the balancing tests used by the NLRB, California, Illinois and Pennsylvania in support of its position. See generally National Labor Relations Act §§ 8(a)(5) & 8(d) (Baldwin 1995) (as interpreted in *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981)); California Government Code § 3543.2(a) (as interpreted in *San Mateo School Dist. v. PERB*, 663 P.2d 523 (Cal. 1983)); Illinois Compiled Statute 315/4 (as interpreted in *Central City Educ. Assoc., IEA/NEA v. IELRB*, 599 N.E.2d 892 (Ill. 1992)); Pennsylvania Statute § 1101.702 (as interpreted in *PLRB v. State College Area Sch. Dist.*, 337 A.2d 262 (Pa. 1975)).

<sup>153</sup> Beyond the internal problems of O.R.C. § 4117.08(C), public employers must also deal with SERB's sleights of hand via the balancing test.

<sup>154</sup> See *supra* note 99.

<sup>155</sup> The principle of *stare decisis* compels adjudicatory bodies to abide by, or adhere to, decided cases.

*D. Statutory Interpretation: Giving Words Equal Effect*

In the *Youngstown* decision, SERB explores the exercise of statutory interpretation.<sup>156</sup> SERB notes that "words should not be ignored or deleted, and such words must be presumed to have had an intended meaning if one can be found."<sup>157</sup> SERB also states that the interpretation "must balance the right of employers to run the public business with the right of their employees to engage in collective bargaining."<sup>158</sup> Seemingly in accordance with the guidelines issued in *SERB v. Belmont County Engineer*<sup>159</sup> (*Belmont*), SERB interprets O.R.C. section 4117.08(C) by creating the aforementioned *Youngstown* balancing test.<sup>160</sup>

In *Belmont*, the majority correctly noted that "in interpreting a legislative enactment, the courts may not simply rewrite it on the basis that they are thereby improving the law, or write what they consider better acts, or read into a statute that which is not found there."<sup>161</sup> An analysis of O.R.C. section 4117.08(C) reveals that SERB's interpretation of that subsection in the *Youngstown* decision violates the *Belmont* decision's guidelines. Specifically, SERB seems to read "into a statute that which is not found there."<sup>162</sup> By giving more weight to the "affects" language in O.R.C. section 4117.08(C) than to the preceding language in O.R.C. section 4117.08(C)(1)-(9), SERB erroneously concludes that the statute's language attempts to balance inherent management rights against mandatory subjects of bargaining.

When interpreting statutes, interpreting bodies should place an emphasis on adherence to the statutory text.<sup>163</sup> United States Supreme Court Justice Antonin Scalia maintains that the "subjectivity of the search for intent . . . gives judges more discretion than they should have under our system of government."<sup>164</sup>

The key point of contention in O.R.C. section 4117.08(C) is the much noted "affects" language. This contention surfaced as a result of a political

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<sup>156</sup> See *Youngstown*, 12 OPER ¶ 1543, at X-392-X-395.

<sup>157</sup> *Id.* at X-393.

<sup>158</sup> *Id.*

<sup>159</sup> 6 OPER ¶ 6273, X-311 (Ohio State Employment Relations Board January 25, 1986).

<sup>160</sup> See *Youngstown*, 12 OPER ¶ 1543, at X-393-X-394.

<sup>161</sup> *Belmont*, 6 OPER ¶ 6273, at X-312.

<sup>162</sup> See *infra* notes 165-177 and accompanying text.

<sup>163</sup> See James E. Westbrook, *A Comparison of the Interpretation of Statutes and Collective Bargaining Agreements: Grasping the Pivot of Tao*, 60 MO. L. REV. 283, 288-289 (1995).

<sup>164</sup> *Id.*

pay-back by the legislature.<sup>165</sup> As noted by the majority in the *Lorain II* decision, the legislature chose to use "affect," rather than "effect"—a verb, rather than a noun.<sup>166</sup> Because the legislature used "affect," SERB must read the statute to give that language effect. However, this necessity does not require SERB to give the "affects" language greater weight than the inherent management rights language preceding it. Rather, SERB should interpret O.R.C. section 4117.08(C) in light of *all* the language and by so doing give equal weight to all the language in the subsection. This method is the only way faithfully to effectuate the entire subsection.

In the dissenting opinions from both *Lorain* decisions, SERB Chairman Jack Day and Supreme Court of Ohio Chief Justice Thomas Moyer properly interpreted O.R.C. section 4117.08(C) to effectuate the entire subsection.<sup>167</sup> Chairman Day, on examining O.R.C. section 4117.08(C), noted the following:

At first blush it would appear that the listing of subjects for which bargaining is not mandatory [i.e., O.R.C. section 4117.08(C)(1)-(9)], coupled with the caveat that the non-mandatory subjects may be bargainable if they "affect wages, hours, terms and conditions of employment," poses a contradiction. However, there is a rationale which resolves the seeming contrariety. That rationale would permit management to exercise the listed prerogatives unilaterally but requires bargaining on the effects of that exercise.<sup>168</sup>

Chief Justice Moyer agreed with this interpretation on appeal, and noted that it "gives effect to the plain meaning of the words used therein, preserves the rights of management to determine the means or personnel by which its obligations under the collective bargaining agreement are to be achieved, and protects the bargaining rights of the bargaining unit members."<sup>169</sup>

Furthermore, Chairman Day's interpretation accomplishes two things. First, it recognizes the concept of inherent management rights as explicitly stated in O.R.C. section 4117.08(C)(1)-(9).<sup>170</sup> Second, it recognizes that O.R.C. section 4117.08(A)<sup>171</sup> covers non-inherent management rights

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<sup>165</sup> See *supra* note 111.

<sup>166</sup> See *Lorain II*, 533 N.E.2d at 268.

<sup>167</sup> See *Lorain II*, 533 N.E.2d at 269-270; *Lorain*, 3 OPER ¶ 3064, at VII-131.

<sup>168</sup> *Lorain*, 3 OPER ¶ 3064, at VII-131.

<sup>169</sup> *Lorain II*, 533 N.E.2d at 270.

<sup>170</sup> See *supra* note 33.

<sup>171</sup> O.R.C. § 4117.08(A) reads in pertinent part:

which are subject to both decision and effects bargaining. This recognition of O.R.C. section 4117.08(A) leaves the "affects" language to cover the effects bargaining, which must occur when inherent management rights "affect" wages, hours, terms and conditions of employment—an area not covered expressly anywhere else in O.R.C. chapter 4117.<sup>172</sup>

This interpretation is best illustrated by a Venn diagram<sup>173</sup> with one circle representing mandatory bargaining subjects and another circle representing inherent management rights. The two circles overlap each other indicating that (1) non-inherent management rights matters are subject to decision and effects bargaining (this gives O.R.C. section 4117.08(A) effect),<sup>174</sup> (2) inherent management rights matters are subject to effects bargaining (this gives the O.R.C. section 4117.08(C) "affects" language effect)<sup>175</sup> and (3) inherent management rights matters are not subject to decision bargaining (this gives O.R.C. section 4117.08(C)(1)-(9) effect).<sup>176</sup>

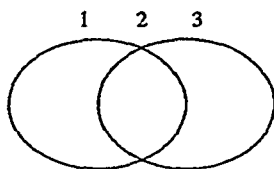
In light of the above, the *Youngstown* decision illustrates a semantic sleight of hand. By expressly rejecting both *Lorain* and *Lakewood*, SERB appears to move to the center, but as this Note demonstrates, the ultimate question pertaining to the existence of inherent management rights that are beyond the reach of either SERB or the unions to challenge remains

All matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative, except as otherwise specified in this section.

OHIO REV. CODE ANN. § 4117.08(A) (Baldwin 1995).

<sup>172</sup> See O.R.C. § 4117.08 (Baldwin 1995).

<sup>173</sup> The left circle represents mandatory subjects of bargaining, and the right circle represents inherent management rights.



<sup>174</sup> See *supra* notes 171 and 173.

<sup>175</sup> See *supra* note 173. The "affects" language of O.R.C. § 4117.08(C) reads in pertinent part: "The employer is not required to bargain on subjects reserved to the management and direction of the governmental unit *except as affect wages, hours, terms and conditions of employment.*" OHIO REV. CODE ANN. § 4117.08(C) (Baldwin 1995) (emphasis added).

<sup>176</sup> See *supra* notes 33 and 173.

dubious. Thus, SERB's movement toward inherent management rights is *de minimis*.<sup>177</sup> The only interpretation of O.R.C. section 4117.08(C) that properly effectuates the entire provision is the interpretation offered by Chairman Day and Chief Justice Moyer.

## V. WHY DEFERENCE TO ARBITRATION DECISIONS IS REQUIRED

Arbitration is only binding if courts enforce the arbitration decision. Without court deference, arbitration becomes a futile, worthless activity. In the *Youghiogheny & Ohio Coal Co. v. Oszust*<sup>178</sup> decision, the Supreme Court of Ohio succinctly elucidated the rationale behind arbitration:

[T]he very purpose of arbitration 'is to reach a final disposition of the controversy between them, and to avoid future litigation of the same matters.' . . . [The] arbitrator's authority is confined to the resolution of issues submitted regarding contractual rights. The arbitrator is bound to interpret and apply the collective bargaining agreement in accordance with instructions from the parties to the agreement.<sup>179</sup>

Therefore, absent an overriding public policy reason, the usefulness of arbitration is weakened if a court allows subsequent proceedings on the matter settled by the arbitration decision.<sup>180</sup> Also, subsequent meddling by courts tends to reduce the incentive both parties have to arbitrate a dispute.<sup>181</sup>

In the *Youngstown* decision, SERB emphatically states that it is "not legally bound to accept an arbitrator's interpretation of a contract . . . [nor is it] compelled to give deference to an arbitrator's award."<sup>182</sup> SERB refers the reader to no case law in support of its position, nor does SERB offer any justification for such a position.<sup>183</sup> In fact, SERB and NLRB case law,

<sup>177</sup> This phrase means small or minimal. BLACK'S LAW DICTIONARY 431 (6th ed. 1990).

<sup>178</sup> 491 N.E.2d 298 (Ohio 1986).

<sup>179</sup> *Id.* at 299-300 (quoting *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964) (alteration in original)).

<sup>180</sup> See 18 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 4475 (1981 & Supp. 1996).

<sup>181</sup> See *infra* note 190 and accompanying text.

<sup>182</sup> *Youngstown*, 12 OPER ¶ 1543, at X-395.

<sup>183</sup> SERB does cite *SERB v. East Palestine City Sch. Dist. Bd. of Educ.*, 5 OPER ¶ 5777, X-635 (Ohio State Employment Relations Board June 29, 1988), to support its conclusion. However, that case stands for the proposition that in situations where SERB makes a decision which is appealed, the appellate courts must give deference to SERB's decision. The court stated that "[c]ourts . . . are required to give due deference to an

as well as public policy, come to the exact opposite conclusion.<sup>184</sup> Although the aforementioned language is dicta,<sup>185</sup> both state public employers and unions should take notice of this early warning by SERB.

Two SERB cases offer compelling arguments in support of giving deference to arbitration decisions. In *In re Upper Arlington Education Association v. Upper Arlington Board of Education*<sup>186</sup> (*Upper Arlington*), SERB declared the following:

Any party who wishes that the [arbitration] award be reviewed to determine whether the unfair labor practice issue(s) were adequately resolved with consideration for due process rights of the parties, must file a Motion for Review with the Board no later than thirty (30) days after the award issues. The motion should contain a statement of reasons why the alleged unfair labor practice should not be dismissed in view of the award. If a Motion for Review is not timely filed, the Board will assume the matter has been resolved and dismiss the ULP.<sup>187</sup>

Essentially, this means that unless a party to the arbitration objects to the arbitration decision, SERB should not interfere with the decision. As expressly stated, absent a Motion for Review filing, SERB will assume proper resolution and summarily dismiss the ULP.<sup>188</sup> This practice strongly indicates that SERB will give deference to an arbitration decision. Even construing the above language liberally does not permit SERB *sua sponte*<sup>189</sup> to disregard the arbitration decision.

In addition, in the 1993 *SERB v. Euclid City School District Board of Education*<sup>190</sup> decision (*Euclid*), a unanimous SERB stated that “[a]n

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administrative interpretation . . . .” *Id.* at X-637 (quoting *Jones Metal Prod. v. Walker*, 281 N.E.2d 1, 8 (Ohio 1972)). Furthermore, the court stated that an agency’s interpretation “it should not be rejected merely because the courts might prefer another view of the statute [contract].” *Id.* at X-637 (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)). Hence, that case in no way supports the idea that when SERB defers to arbitration, it is not thereafter bound even minimally by the arbitration decision.

<sup>184</sup> See *infra* notes 186-195 and accompanying text.

<sup>185</sup> See *supra* note 7.

<sup>186</sup> 9 OPER ¶ 1485, X-445 (Ohio State Employment Relations Board June 30, 1992).

<sup>187</sup> *Id.* at X-446.

<sup>188</sup> See *id.*

<sup>189</sup> This phrase means SERB would act on “its own will or motion.” BLACK’S LAW DICTIONARY 1424 (6th ed. 1990).

<sup>190</sup> 10 OPER ¶ 1595, X-519 (Ohio State Employment Relations Board October 13, 1993).

employee organization should not be permitted to shift the litigation of pure contract interpretation disputes to SERB . . . . [T]here would be little purpose to employers agreeing to such arbitration in contracts if such clauses could be so easily circumvented."<sup>191</sup> Just as an employee organization should be prohibited from such action, SERB too should be so confined. Otherwise, the conclusion is the same—neither party has the incentive to bind themselves to arbitration if SERB could disregard the arbitration decision at its whim.

The NLRB has developed its law on deference to arbitration decisions. The NLRB stated that so long as the employer's action was not meant to erode the union and was not facially erroneous, but instead was grounded in a contract privilege and the use of arbitration would resolve both the ULP and the grievance, then the NLRB should defer to the arbitration clause in the contract.<sup>192</sup> When the NLRB defers to arbitration, it retains jurisdiction to insure that the arbitration award resolves the ULP.<sup>193</sup> This resolution only requires the contractual issue of the arbitration to be "factually parallel" to the ULP and that the parties present the arbitrator with facts relevant to resolve the ULP.<sup>194</sup>

SERB should take notice of the NLRB's case law and follow suit accordingly. In light of the above, SERB should either clarify what it meant by the language used in *Youngstown*, or SERB should retreat from such an extreme position. Clearly, in cases where one party files a Motion for Review with SERB, SERB should give less deference to the arbitrator's award.<sup>195</sup> However, if the arbitration decision is not challenged by either party, then SERB should give deference to the arbitration decision. Failure to do so will erode the incentive for both state public employers and unions to agree to binding arbitration.

## VI. LEGISLATIVE FAILURES THEN AND NOW

The problems with O.R.C. section 4117.08(C) are not new. Those problems began over sixteen years ago when overly ambitious unions decided to enter the political arena in Ohio by contributing heavily to pro-union politicians.<sup>196</sup> One would not be so naive as to assert that unions

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<sup>191</sup> *Id.* at X-519.

<sup>192</sup> See *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971).

<sup>193</sup> See *Speilburg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

<sup>194</sup> See *Olin Corp.*, 268 N.L.R.B. 573, 574 (1984).

<sup>195</sup> See Louis S. Cataland, Note, *Binding Arbitration and the NonDelegation Doctrine: Does Ohio's Collective Bargaining Act Unconstitutionally Delegate Legislative Authority to Administratively Appointed Arbitrators?*, 6 OHIO ST. J. ON DISP. RESOL. 83, 96-97 (1990).

<sup>196</sup> See *supra* notes 17-38 and accompanying text.

should have been precluded from entering the political fray. However, unlike other areas of politics, there existed no counter-balancing lobbying organization to bring the debate to the center.<sup>197</sup> Quite simply, there existed no lobbying group for the state public employers because those individuals had nothing financially or personally to lose—they were agents of the state with no real vested interest.<sup>198</sup> Only the State of Ohio and the taxpayers of Ohio stood to lose—and both did.

Today, unions with public-sector employees are the fastest growing unions in Ohio.<sup>199</sup> As noted above, this enormous growth is despite the fact that Ohio has had a Republican governor for the past six years and a Republican-controlled legislature for the last three years.<sup>200</sup> In a recent article, Professor Greg Delemeester noted the tremendous growth in public employee compensation:

On average, state employees . . . earned \$32,276 in 1994, 24.9 percent more than the average worker in the private sector. This translates into an annual "wage premium" of \$6,428 for state employees. This premium is higher than a decade ago; in 1986, it was only \$1,087, or 5.4 percent . . . . State-employee wages grew by 54.1 percent from 1986 to 1994. Meanwhile, private-sector wages grew by only 30.1 percent.

. . . .

Unions are often able to use collective-bargaining laws to limit competition for workers and garner higher wages . . . . All in all, the public-employee wage premium translates into added costs of about \$411 million.<sup>201</sup>

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<sup>197</sup> Lobbying poses unique problems for our republican form of government. In theory, representatives are supposed to vote in accordance with the majority of voters in their district. In practice, a strong lobbying effort can "persuade" a representative to vote against the wishes of his constituents. Some would argue that the constituents could then vote him out of office in the next election. There are two problems with this argument: (1) it assumes that the voters are informed (typically, this is done by an opposing lobbying group, but when only one side is represented by a lobbying group, there is no lobbying group on the other side to inform the voters) and (2) the damage is done because the legislation is now law. Hence, in situations involving collective bargaining, only the state public employees will have an active lobby because they are the only individuals who stand personally to gain or lose anything.

<sup>198</sup> See *infra* note 200.

<sup>199</sup> See Stephen Phillips, *Wading into Battle over Bargaining Law*, THE PLAIN DEALER, June 16, 1996, at A20.

<sup>200</sup> See Greg Delemeester, *State Employees' Salaries Outstrip Those in Private Sector*, THE COLUMBUS DISPATCH, July 17, 1996, at 9A.

<sup>201</sup> *Id.*



Coincidentally, the Collective Bargaining Act became law in 1983<sup>202</sup> and in 1986 would have produced its second round of contracts between public employers and the various unions.<sup>203</sup> Perhaps the unbridled growth in public employee compensation is a direct result of the pro-union collective bargaining act. At a taxpayer cost of \$411 million, it is a steep price to pay for political favoritism.

The National Education Association (NEA) vividly illustrates the resources a union has at its fingertips. The NEA is the national teachers' union; it has fifty-two state-level affiliates and approximately 13,000 local level affiliates.<sup>204</sup> The NEA collects a fixed proportion of its members salary in the form of membership dues.<sup>205</sup> This arrangement creates an incentive for the NEA to bargain for increased salaries in order to increase the amount of money it collects in membership dues.<sup>206</sup> In 1992-1993, the dues collected by the NEA at the national, state and local levels totaled approximately \$750 million.<sup>207</sup> The NEA also has its own political action committee that contributed \$2.3 million to the congressional elections in 1992.<sup>208</sup> As noted above, there exists no lobbying organization in the public employment sphere to counter-balance the substantial financial and physical support unions give to political candidates.

This type of unopposed influence worked in 1983 when the unions' "investments" paid off handsomely as their political allies won and were then able to fashion one of the most union-friendly collective bargaining acts in the country.<sup>209</sup> As many critics of the collective bargaining legislation noted, the citizens of Ohio "would have been better served . . . if [the legislature] had made some real effort to determine what subjects should have been effectively removed from the bargaining table—rather than

<sup>202</sup> See *supra* notes 17-18 and accompanying text.

<sup>203</sup> State public employers and the various unions would have negotiated over the first contract in 1983. The contracts typically lasted for three years before new rounds of contract negotiations took place. Hence, the second round of contract negotiations would have occurred in 1986. Intuitively, both public employers and unions would have learned valuable lessons from the first round of contract negotiations. However, because unions were affiliations of national organizations with decades of bargaining experience, the unions could use seasoned veterans to advise and negotiate the contracts, whereas the state public employers had no similar affiliations or experience to aid them in the contract negotiations.

<sup>204</sup> See Peter Brimelow & Leslie Spencer, *The National Extortion Association?*, FORBES, June 7, 1993, at 79, 79.

<sup>205</sup> See *id.*

<sup>206</sup> See *id.*

<sup>207</sup> See *id.*

<sup>208</sup> See *id.* at 80.

<sup>209</sup> See O'Reilly, *supra* note 19, at 3.

purporting to remove items from the table with one hand while placing them back on the table with the other."<sup>210</sup> Such action led to the many years of problems the state of Ohio has experienced due to the "affects" language in O.R.C. section 4117.08(C).

Should all the blame for this legislative failure fall on the shoulders of those politicians from 1983? No. In the summer of 1995, a restructuring bill known as Senate Bill 162 went before the legislature. As introduced, Senate Bill 162 contained changes in O.R.C. section 4117.08(C) that would have allowed adjudicatory bodies to interpret O.R.C. section 4117.08(C) as suggested in this Note.<sup>211</sup> These changes would have finally given courts the power to recognize the concept of inherent management rights because the new language would have legislatively overturned or mitigated the *Lorain II* decision which failed to give O.R.C. section 4117.08(C)(1)-(9) effect. Hence, SERB could have truly established the concept of inherent management rights without having to dance around the strict constraints of the *Lorain II* decision.

However, at some point in the amendment process, the vital changes to O.R.C. section 4117.08(C) were deleted.<sup>212</sup> With Republicans holding majorities in the legislature and the governorship, the deletions came as a huge surprise and disappointment to state public employers.<sup>213</sup> A possible explanation exists in the campaign contributions received by many Republican legislators from the unions.<sup>214</sup>

<sup>210</sup> Bumpass & Ashmus, *supra* note 37, at 640.

<sup>211</sup> I obtained this information from attending several of the legislative sessions in the summer of 1995 when Senate Bill 162 was under consideration.

<sup>212</sup> *See id.*

<sup>213</sup> Many of the Republican legislators that allowed the deletion to O.R.C. § 4117.08 may have done so because they feared retaliation by the unions at the ballot box.

<sup>214</sup> As echoed throughout the country today, many politicians from both parties have become more influenced by the various lobbying groups. This reality causes the general public to view politics from a jaded perspective. The following list represents a partial compilation of the contributions made by two unions to Republican politicians for election purposes:

*Ohio Education Association*

Republican Senate Campaign Committee	\$6,000
House Republican Campaign Committee	\$5,000
Ohio House Republican Campaign Committee	\$2,750

*House of Representatives*

Tom Johnson	\$4,250
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## SEEING THE FOREST THROUGH THE TREES

Governor Voinovich also seemed to change his position on the pro-union collective bargaining bill.<sup>215</sup> While he was Mayor of Cleveland, Governor Voinovich was against the pro-union collective bargaining law;<sup>216</sup> now as Governor of Ohio with United States Senate aspirations, Governor Voinovich is in favor of the pro-union collective bargaining law.<sup>217</sup>

Ironically, just as then Mayor Voinovich believed in the 1980s, current Cleveland Mayor Michael R. White, a Democrat, is against the collective bargaining law because it prevents him from exercising inherent management rights that would save taxpayers approximately one million dollars a year.<sup>218</sup> In response to union uproar over his position, Mayor White stated that "[w]e can't be afraid of the political reprisals. Who's going to stand up for the citizens? Clearly the citizens who are union members have a vested interest in maintaining the status quo."<sup>219</sup>

The Republican legislators and Governor Voinovich may get yet another chance to level the playing field in Ohio collective bargaining and

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Randy Gardner	\$2,150
Sally Perz	\$2,100
Doug White	\$2,100
Joy Padgett	\$2,000
Don Mottley	\$2,000
Senate	
Merle Kearns	\$10,700
Stanley Aronoff	\$9,500
Scott Oelslager	\$5,400
Eugene Watts	\$4,100
Charles Horn	\$2,500

### OCSEA

Republican Senate Campaign Committee	\$7,600
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Senate	
Stanley Aronoff	\$18,000

Official State Records, Ohio Secretary of State, Election Section (1995).

<sup>215</sup> See John Chalfant, *Fight Brews over Proposed Collective Bargaining Law*, THE REPOSITORY, Oct. 8, 1995, at A9.

<sup>216</sup> See *id.*

<sup>217</sup> See *id.*

<sup>218</sup> See Phillips, *supra* note 199, at A1 and A20.

<sup>219</sup> Stephen Koff, *Labor Takes Protest to the Streets*, THE PLAIN DEALER, June 8, 1996, at A1 and A12.

to show the citizens of Ohio that "business as usual" is not the maxim for Ohio politicians. Although not yet introduced in either the House of Representatives or the Senate, a bill exists that would make the necessary changes to O.R.C. section 4117.08(C).<sup>220</sup> This bill would explicitly remove the inherent management rights listed in O.R.C. section 4117.08(C)(1)-(9) from mandatory subjects of bargaining,<sup>221</sup> finally giving state public

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<sup>220</sup> If the bill is introduced, then a House Bill Number or a Senate Bill Number will be assigned for reference purposes. See generally J. Kenneth Blackwell, *Public Employee Bargaining Requires Balance*, THE COLUMBUS DISPATCH, Feb. 4, 1997, at 7A.

<sup>221</sup> Currently, O.R.C. § 4117.08 is written in the proposed bill as follows:

Sec. 4117.08.

(A) All matters pertaining to wages, hours, and other terms and conditions of employment are subject to collective bargaining between the public employer and the exclusive representative, except as otherwise specified in this section.

(B) The conduct and grading of civil service examinations, the rating of candidates, the establishment of eligible lists from the examinations, and the original appointments from the eligible lists are not appropriate subjects for collective bargaining. For purposes of this section, "Original Appointment" means the first appointment of a public employee to a position with a new appointing authority, and does not include any subsequent promotion, reduction, or transfer to another position.

(C) Notwithstanding division (A) of this section, unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117 of the Revised Code impairs the right and responsibility of each public employer to :

(1) Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as functions and programs of the public employer, standards of services, its overall budget, utilization of technology, and organizational structure;

(2) Direct, supervise, evaluate, or hire employees;

(3) Maintain and improve the efficiency and effectiveness of governmental operations;

(4) Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;

(5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees;

(6) Determine the adequacy of the work force;

employers the inherent management rights they should have received back in 1983.

The bottom line is that without legislative action, the ineffectual interpretation in the *Youngstown* decision will remain the law. State public employers may one day see the long-awaited arrival of inherent management rights beyond the reach of unions to challenge and SERB to curtail. Until that time comes, state public employers should learn a few magic tricks of their own to deal with SERB's sleights of hand and the legislature's inaction.

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- (7) Determine the overall mission of the employer as unit of government;
  - (8) Effectively manage the work force;
  - (9) Take actions to carry out the mission of the public employer as a governmental unit;
  - (10) Contract with any public or private entity to provide services.

(D) The employer is not required to bargain collectively on subjects reserved to the management and direction of the governmental unit except with respect to the substantial effects the employer's decisions will have on wages, hours, or other substantial terms and conditions of employment. Any reasonably foreseeable, substantial effects on wages, hours, or other substantial terms and conditions of employment arising from the employer's decisions shall be bargained as soon as practicable. If the employee organization makes a timely request to bargain collectively and it is reasonably practicable to do so, the parties must make a good faith attempt to bargain collectively the substantial effects prior to the implementation of the employer's decisions. However, a public employer may implement its decisions before resolving all of the substantial effects on wages, hours, and other substantial terms and conditions of employment. Nothing in this division shall be construed to permit any party to amend the written provisions of a collective bargaining agreement during its term without consent of the parties to the agreement.

Where a collective bargaining makes no specification about subject matter, the employer has reserved exclusively all of the inherent rights and authority to make decisions in order to manage and operate its facilities and programs regarding that subject matter.

(E) A public employee or exclusive representative may raise a legitimate complaint or file a grievance based on the collective bargaining agreement.

## VII. CONCLUSION

In sum, the *Youngstown* decision poses some continued problems, and possibly some new problems, for state public employers and unions. Although *Youngstown* appears to be more favorable to the concept of inherent management rights, stripping away the semantics of the decision reveals that state public employers still do not possess inherent management rights beyond the reach of unions and SERB. Likewise, SERB's position that arbitration decisions are due no deference is highly troublesome. SERB should clarify this position in the future to assure both state public employers and unions that arbitration is worthwhile. Without assurance by SERB, the incentive to arbitrate is seriously undermined.

As for the legislative failures of the past and present, the citizens of Ohio should demand fairness in collective bargaining between state public employers and unions by supporting candidates more concerned about equity in collective bargaining than with their own reelection. Thus, while unions and state public employees make off into the forest with Ohio tax dollars, the legislature fails even to see the forest because the next election is in the way.

Now do you understand?